86-700

Supreme Court, U.S.
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No. 86-_____

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

JOHN D. VODILA

Petitioner,

vs.

RODERICK CLELLAND; DORTHY DEMHARTER; JUAN GHERSI; DONALD COTTON, JR.; DOROTHY COOPER; WILLIAM SPIKER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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30pp

QUESTIONS PRESENTED FOR REVIEW

In light of the standards for determining retroactive application of a decision set forth in *Chevron Oil Co., v. Huson*, 404 U.S.97, 106-107, 92 S.Ct. 349, 355-56, 30 L.Ed.2d. 296 (1971), is dismissal of a complaint proper where such dismissal is predicated on a change in the applicable statute of limitations decided after the dismissed case was filed where the applicable statute of limitations in the jurisdiction in question was already well-settled?

PARTIES TO THE PROCEEDING

The sole parties to the proceeding are set forth in the caption.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, John D. Vodila, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, which affirmed, on other grounds, the decision of the United States District Court for the Northern District of Ohio granting respondents' motion to dismiss.

OPINIONS BELOW

The Sixth Circuit's per curiam opinion, No. 85-3461 (6th Cir. August 1, 1986) and the District Court's Memorandum and Order are set forth in Appendix A-1-A-10.

JURISDICTION

The judgment of the Court of Appeals was entered on August 1, 1986. This petition was filed within ninety days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

The federal statute involved in this case is 42 U.S.C. Section 1983.

STATEMENT OF THE CASE

The petitioner is a citizen of the United States and was a dentist employed full time by Massillon State Hospital, a state of Ohio mental institution. Petitioner was in the unclassified civil service of the State of Ohio and was dismissed from his position on July 20, 1980 without notice and without any opportunity for a due process hearing to refute the charges made against him. The removal order contained a fifteen page "Bill of Particulars" purportedly detailing the faults with Petitioner's performance which gave rise to his dismissal. Additionally, the removal order itself cited all of the criteria for removal set out in the Ohio Revised Code for removal of a classified civil service employee.

Subsequently, Petitioner initiated the extant litigation because he had never been afforded any type of hearing at any level. The action was filed on April 6, 1983, in reliance on the statute of limitations for actions pursuant to 42 U.S.C. Section 1983. The trial court entered a judgment dismissing the complaint subsequent to a motion to dismiss filed by the defendants.

A timely appeal followed and while waiting for oral argument, the Sixth Circuit Court of Appeals rendered its decision in *Mulligan v. Hazard*, 777 F2d 340 (CA 6 1985), shortening the period of limitations for 42 U.S.C.§1983 actions in Ohio to one year and applying this Court's decision in *Wilson v. Garcia*, ____ U.S. ____, 105 S. Ct. 1938, 85 L.Ed. 2d. 254 (1985), retroactively. Correspondingly, the Sixth Cir-

cuit Court of Appeals dismissed this instant action because it was filed more than one year after the Petitioner was dismissed.

The appellate court ignored the admonitions of *Chevron Oil Company v. Huson*, 404 U.S. 97, 106-07, 92 S. Ct. 349, 355-56, 30 L. Ed. 2d. 296 (1971) concerning retroactive application of decisions and applied *Mulligan v. Hazard*, 777 F.2d. 340 (CA 6 1985) retroactively even though the period of limitations for employment-type cases brought pursuant to 42 U.S.C. Section 1983 was well-settled in Ohio. This is the only issue raised in this petition.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE SIXTH CIRCUIT CONFLICTS WITH THE TENTH AND NINTH CIRCUITS' DECISIONS ON THE SAME ISSUE.

Prior to the Sixth Circuit Court of Appeals opinion in *Mulligan v. Hazard*,777 F.2d. 340 (CA 6 1985), it had been clearly established in Ohio that in an action involving public employer misconduct, a cause of action could be maintained pursuant to 42 U.S.C. Section 1983 if the action was filed within six years of the alleged misconduct. *Schorle v. City of Greenhills*, 524 F. Supp. 821 (S.D. Ohio W.D. 1981); *Campbell v. Sirak*, 476 F. Supp. 21 (S.D. Ohio E.D. 1979). See also, *Mason v. Owens-Illinois*, 517 F.2d. 520 (CA 6 1975). At the time this action was originally filed, Petitioner relied upon this settled precedent. In dismissing the action the Sixth Circuit points specifically to *Mulligan, supra*, as the *raison d'etre* for its action.

Such action does not comport with this Court's direction in *Chevron Oil Company v. Huson, supra. Chevron Oil* cited three factors to be considered before any decision is applied retroactively:

1. Whether the decision establishes a new principle of law;

2. Whether retroactive application will further or retard the purpose of the rule in question; and

3. Whether applying the new decision retroactively will produce substantial inequitable results. *Chevron Oil, supra,* 404 U.S. 106–107.

Mulligan does not even address the *Chevron Oil* factors. Instead, the Sixth Circuit merely states that ". . ., *Wilson* implicitly mandates that its holding be applied retroactively." *Mulligan, supra,* p. 344. Petitioner vigorously disagrees with the Sixth Circuit's analysis and submits that *Wilson* must be read in light of the *Chevron Oil* case and only then can a proper decision concerning retroactivity be made. While Petitioner is aware that other Circuit Courts of Appeal have considered *Chevron Oil* and still applied *Wilson* retroactively, it is submitted that the analysis in those cases does not go far enough.

Gates v. Spinks, 771 F.2d. 916 (CA 5 1985), cert. denied, ____ U.S. ____, 106 S. Ct. 1378, 89 L.Ed. 2d. 603 (1986) and *Jones v. Preuit & Mauldin,* 763 F.2d. 1250 (Ca 11 1985), cert. denied, ____ U.S. ____, 106 S. Ct. 893, 88 L.Ed. 2d. 926 (1986) both applied *Wilson* retroactively but never even gave lip service to *Chevron Oil. Wycoff v. Menke,* 773 F.2d. 983 (CA 8 1985), cert. denied, 106 S. Ct. 1230 (1986), *Fitzgerald v. Larson,* 769 F.2d 160 (CA 3 1985), and *Smith v. City of Pittsburgh,* 764 F.2d 188 (CA 3 1985), cert. denied, 106 S. Ct. 349 (1986) considered *Chevron Oil* and still applied *Wilson* retroactively although it is uncertain whether these decisions are intended to apply to all situations. The cutting edge for the latter three decisions, however, appeared to be that in each instance, the law of the particular jurisdiction in question concerning what period of time to be applied to 42 U.S.C. Section 1983 was unsettled or lacked any definitive standard. The opinions indicate that; but for this uncertainty and the corresponding need for uniformity, retroactive application of the *Wilson* case would not have occurred.

As noted above, Ohio, for purposes of 42 U.S.C. Section 1983, had a settled rule of law for employment matters, a six year statute of limitations. Therefore, the rationale of *Wycoff, Larson* and *Smith* is obviated for purposes of this case. Because Ohio did not suffer the same uncertainty noted in *Wycoff, Larson* and *Smith,* it is even more imperative that *Chevron Oil* be consulted. In this respect, Petitioner points to the

decisions of the Ninth and Tenth Circuit Courts of Appeal in *Gibson v. United States*, 781 F.2d 1334 (CA 9 1986) and *Jackson v. City of Bloomfield*, 731 F.2d. 652 (CA 10 1984). Most salient is the opinion in *Gibson*, where the Ninth Circuit noted, as should have been noted in *Mulligan* and this case:

> "By directing courts to tie section 1983 actions to a different, shorter limitations provision, *Wilson* marks a clear break from settled circuit authority, potentially of great prejudice to litigants who relied upon the earlier rule. Consideration of the first *Chevron* factor thus militates against retroactivity. The second *Chevron* factor—whether retroactive application would advance or retard uniform federal characterization of Section 1983 claims—does not counsel either way, because this circuit's clear, consistent enunciation of the previous rule served the chief policy goals articulated in *Wilson*: 1) safeguarding the rights of federal civil rights litgants; 2) achieving certainty; and 3) avoiding wasteful relitigation of collateral matters. The final *Chevron* factor weighs dispositively against retroactive application, for it would yield " 'substantial inequitable results' to hold that the respondent 'slept on his rights' at a time when he could not have known the time limitation that the law imposed on him." *Chevron*, 404 U.S. at 108, 92 S. Ct. at 356 (citation omitted). *Gibson v. United States*, 781 F.2d. at 1339. See also, *Jackson v. City of Bloomfield*, 731 F.2d. 652 (CA 10 1984).

Schorle, Campbell and *Mason, supra*, establish a well-settled rule of limitations for 42 U.S.C. Section 1983 cases in Ohio and to apply *Wilson* retroactively via *Mulligan* marks a clear break with established precedent. Futher, as noted in *Gibson* and is the case here, the second *Chevron Oil* rule is satisfied by having prior pronunciations which fulfill the chief policy goals highlighted in *Wilson*. Finally, there is no question that substantial inequitable results innur to Petitioner by retroactive application of *Wilson*.

In applying *Wilson* retroactively, the Sixth Circuit is squarely in conflict with the Ninth and Tenth Circuits and, although Petitioner is aware

this Court denied certiorari in *Mulligan v. Hazard*, 106 S. Ct. 2902 (1986), it is submitted this petition should be granted as *Mulligan* did not even address *Chevron Oil*, and especially in light of the fact that Ohio had a settled period of time for actions of this type which would bring it squarely within the *Gibson* analysis. It should also be noted that Justice White, joined by Justice Marshall, in his dissent regarding the denial of certiorari in *Mulligan v. Hazard*, 106 S. Ct. 2902 (1986), cited the tortuous history of this issue since *Wilson* and urged this Court to fully address the issue of retroactivity as it applies to 42 U.S.C. Section 1983 and resolve this issue with finality. This need is significantly highlighted by the fact that this Court only recently granted certiorari in *Al-Khazraji v. St. Francis College*, 784 F.2d. 505 (CA 3 1986), cert. granted, 55 U.S.L.W. 3231, October 6, 1986. In that case, this Court has agreed to review the effect of retroactive application of *Wilson* on 42 U.S.C. § 1981, the companion statute to 42 U.S.C. § 1983. It is submitted that if the *Chevron Oil* analysis is applied, the only fair and equitable result where a jurisdiction already had a settled period of limitations is that *Wilson* should not be applied retroactively.

CONCLUSION

Because of the conflict among the circuits, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Jay F. McKirahan, a member of the Bar of this Court and counsel for Petitioner herein, hereby certify that on this 28th day of October, 1986, three copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit were served, postage prepaid, upon David Kovach, Ohio Attorney Generals Office, 8th Floor, 316 W. Superior Avenue, Cleveland, Ohio 44113.

JAY F. MCKIRAHAN

No. 86-_____

IN THE

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OCTOBER TERM 1986

JOHN D. VODILA

Petitioner,

vs.

RODERICK CLELLAND; DORTHY DEMHARTER; JUAN GHERSI; DONALD COTTON, JR.; DOROTHY COOPER; WILLIAM SPIKER,

Respondents.

PETITION FOR WRIT OF CERTIORARI
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FOR THE SIXTH CIRCUIT

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

R. JOHN D. VODILA,

Plaintiff-Appellant,

v.

RODERICK CLELLAND; DOROTHY DEMHARTER; JIM GHERSI; DR. DONALD COTTON, JR.; DOROTHY COOPER; WILLIAM SPIKER,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. *This notice is to be* ***prominently*** *displayed if this decision is reproduced.*

Decided and Filed _____

Before **KEITH, NELSON** and **BOGGS,** Circuit Judges.

PER CURIAM. Plaintiff-appellant, a dentist formerly employed by the Ohio State Hospital at Massillon, was discharged from that employment on July 20, 1980. On April 6, 1983, he brought an action against the superintendent of the hospital and others under 42 U.S.C. §1983. Without answering the complaint, the defendants moved to dismiss it pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. On February 14, 1984, a magistrate filed a report and recommendation concluding that the motion to dismiss should be granted. On April 17, 1985, the United States Supreme Court handed down its decision in *Wilson v. Garcia*, 471 U.S. ____, 105 S.Ct. 1938 (1985), holding that the timeliness of all §1983 claims is governed by the forum state's statute of limitations for personal injury actions. On May 17, 1985, after the plaintiff dentist had filed an amended complaint without first obtaining leave of court to do so, Chief Judge Battisti entered an order approving and adopting the magistrate's report and recommendation and dismiss-

ing the action, under Rule 12(b)(6), for failure to state a claim. Believing that any claim the plaintiff dentist may have had was barred by Ohio's one year statute of limitations, we shall affirm the judgment of dismissal.

As this court held in *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 54 U.S.L.W. 3808 (June 9, 1986), where the limitations period for a section 1983 action is established by reference to Ohio Law, the action must be brought within one year after the cause of action accrued. The one year limitations period applies whether or not suit was filed before the Supreme Court's decision in *Wilson v. Garcia*, *supra*, 777 F.2d at 343-44.

It is true that the defendants in this case have not pleaded the statute of limitations as a defense, but they would obviously be entitled to do so if the judgment of the district court were reversed and they were required to file an answer. Because that defense would have to be sustained as a matter of law, we need not consider whether the plaintiff dentist's amended complaint did or did not state a claim on which relief could be granted, nor need we decide whether the amended complaint should have been considered by the district court. Under any view of the case, plaintiff has no claim that had not been barred by the statute of limitations well before April 6, 1983.

The judgment of the district court is **AFFIRMED.**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DR. JOHN VODILA, C83-1512A

Plaintiff,

-vs- **ORDER**

RODERICK CLELLAND, et al.,

Defendants.

Battisti, C.J.

Plaintiff filed the instant action against Defendants Roderick Clelland, Dorothy Demharter, Juan Ghersi, Dr. Donald Cotton Jr., Dorothy Cooper and William Spiker on April 6, 1983. Defendants filed a Motion to Dismiss, or In the Alternative, For a More Definite Statement on June 2, 1983. This Court referred this case to Magistrate Charles R. Laurie for general pretrial supervision on October 25, 1983. Magistrate Laurie filed his Report and Recommendation on February 14, 1984. For the reasons set forth below, this Court adopts the Magistrate's Report and Recommendation and grants Defendants' Rule 12(b)(6) Motion to Dismiss for failure to state a claim upon which relief can be granted.

I.

Plaintiff was employed as a dentist by the Department of Mental Retardation and Developmental Disabilities for the State of Ohio. On July 20, 1980, he was dismissed from his position at Masillon State Hospital pursuant to an order signed by Defendant Clelland, who is superintendent of that institution. The dismissal order "alleged neglect of duty,

failure of good behavior, insubordination, incompetence, misfeasance, malfeasance, and nonfeasance." A 15-page "Bill of Particulars" was attached.[1]

Plaintiff's Complaint, brought pursuant to 42 U.S.C. §§1983, 1985, 1988, and the First and Fourteenth Amendments, charges that he was denied due process of law because he was not afforded any type of hearing to refute the charges against him prior to his dismissal. In addition, plaintiff claims that defendants have denied him his protected liberty interests by impugning his good name and reputation. In addition, plaintiff contends that his First Amendment rights have been chilled in a "Hobson's Choice of whether to grant or refuse access to [his personnel file] by possible other employers." Plaintiff seeks reinstatement with back pay, compensatory and punitive damages in the amount of one million dollars against each individual defendant, and attorney's fees and costs.

II.

DUE PROCESS CLAIMS

This Court has reviewed the Magistrate's Report and Recommendation in light of the Supreme Court's recent decision in *Cleveland Bd. of Education v. Loudermill*,____ U.S. ____, 53 U.S.L.W.4306 (March 19, 1985). Since the Magistrate's Report and Recommendation was filed nearly a year before the *Loudermill* ruling, this Court must be sensitive to any changes in Fourteenth Amendment jurisprudence effected by that case. *Loudermill* held that the Due Process Clause requires a predetermination hearing before an individual (in that case, a public employee) is deprived of a significant property or liberty interest. This Court concludes that the Magistrate's recommendation to dismiss Plaintiff's complaint is consistent with the analysis and principles of *Loudermill* and is correct.

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[1]Plaintiff did not attach either the Dismissal Order or the Bill of Particulars to his complaint and there is no indication that the Magistrate actually reviewed these documents.

A. PROPERTY INTEREST

Whether an individual is entitled to Due Process protection depends on the existence of a valid property or liberty interest. In *Loudermill*, the Court reiterated that property interests are defined by "independent sources such as state law" and found that the Ohio Revisd Code § 124.11 created such a property interest when it defined the respondents as "classified civil service employees" who could not be dismissed "except for misfeasance, malfeasance, or nonfeasance in office." 53 U.S.L.W. at 4307.

In the instant case, however, the Magistrate correctly found that Ohio Revised Code § 124.11(A)(13) defines dentists in the employ of the department of mental health as "unclassified civil servants" and that under state law, as Plaintiff concedes, an unclassified civil servant has no property interest in continued employment. Since Plaintiff has failed to establish a protected property interest, his 14th Amendment Due Process claim must be dismissed.

B. LIBERTY INTEREST

Plaintiff also contends that he was deprived of a liberty interest without due process. In order to establish a protected liberty interest, an individual must demonstrate that: (1) the charges against him are of such nature as to damage his reputation or stigmatize him in the community; (2) that the charges are false; (3) that he was denied a meaningful hearing to clear his name; and (4) that the charges were made public. *Codd v. Velger*, 429 U.S. 624 (1977); *Wells v. Doland*, 711 F.2d 670 676 (5th Cir. 1983). The Magistrate correctly found that Plaintiff nowhere in his pleadings sets out any factual dispute between himself and his employer leading to the conclusion that plaintiff believes the employer's charges are false. It is not enough for Plaintiff to state, as he does in his Objections to the Magistrate's Report and Recommendation (filed March 21, 1984), that it is implicit in his Complaint that he believes the charges are false "when [the Complaint] is read as a whole for purposes of notice pleading." The Magistrate also noted that Plaintiff nowhere disputed the accuracy of the charges, even in his brief oppos-

ing the Motion to Dismiss. Magistrate's Report at 8. Furthermore, the Supreme Court in *Codd v. Velger*, 429 U.S. at 628, explicitly stated that it "was no overly technical application of the rules of pleading" to require an individual asserting a deprived liberty interest to challenge the truth of the charges against him in his pleadings.

In addition, the Magistrate noted that "Plaintiff offers no explanation as to how, when, or to whom publication [of the charges] was made." Magistrate's Report at 8 n.3. Since Plaintiff has failed to meet the publication element of the four-part showing required to establish a liberty interest, the Due Process claims with respect to liberty must also be dismissed. In *Loudermill*, coincidentally, failure to allege how the false charges were published also led to a dismissal of Loudermill's liberty claim. 53 U.S.L.W. at 4310 n.13. Since Plaintiff has failed to meet two of the four elements of his burden, his liberty interest due process claim must be dismissed.

III.

FIRST AMENDMENT CLAIMS

Plaintiff's allegation that his First Amendment rights have been violated because he is faced with the "Hobson's Choice" of granting or refusing access to his personnel files is not cognizable and, as the Magistrate correctly noted, should be dismissed. Plaintiff's First Amendment claim is based on an incorrect and confused reading of two cases. In *Larry v. Lawler*, 605 F.2d 954 (7th Cir. 1978), an employee was rated ineligible for federal employment due to alleged alcoholism and "abusive behavior towards his colleagues." *Id.* at 963. Plaintiff in that case made no First Amendment claim. In responding to Plaintiff's *due process* claims, the Court found that since the Civil Service Commission only provided Plaintiff with a summary of their investigation into his case (and not the entire record) and then required him to respond in writing which could led to a three-year debarment from Government service, the Civil Service Commission was depriving plaintiff of a liberty interest without due process of law. The Court therefore vacated the district court's summary judgment and ordered plaintiff's records expunged.

At no point, however, did the Court state that the mere inclusion of information critical of plaintiff's performance in his personnel files constituted a violation of the First Amendment.

In *Croushorn v. Board of Trustess of University of Tennessee,* 518 F. Supp. 9 (M.D. Tennessee 1980), plaintiff contended that defendants had infringed upon his First Amendment rights in violation of 42 U.S.C. §1983. Plaintiff was discharged from his assistant professorship position at the University of Tennessee. Plaintiff claimed he was discharged, *inter alia,* for criticizing the Commissioner of the Tennessee Department of Human Services in a letter which was publicized in the local newspaper. The Court dismissed this First Amendment claim finding that plaintiff was not terminated for his criticism of a public official. However, plaintiff also alleged that the defendants violated his First Amendment rights by placing letters and other documents in his personnel file regarding his criticism of the public official, specifically letters between the criticized public official and the dean of the University regarding punitive action against plaintiff. The Court found that defendant could be found liable for violating plaintiff's First Amendment rights. However, the Court said "When, as here, the potential or naturally expected use of those files will likely have the effect of penalizing the employee for engaging in such protected activity, the first amendment, not the due process clause forms the basis of the complaint." *ID.* at 41. The Court specifically stated that the "particular papers would never have been produced, much less inserted in the files [of plaintiff], had not plaintiff engaged in protected conduct. Granger's [defendant] action was thus caused by plaintiff's speech, and the harm thereby created directly infringes upon plaintiff's right to engage in such speech." *Id.* at 40.

The instant case therefore is distinguishable from *Croushorn.* Plaintiff in the instant case nowhere alleges that he was discharged for exercising his First Amendment rights nor that information chronicling his exercise of his First Amendment rights appears in his files. Futhermore, while *Croushorn* does discuss the "Hobson's Choice of granting or refusing access" of future employhers to personnel files, *id.* at 40, it is done in the context of demonstrating that plaintiff has a real threat of specific future harm. This "Hobson's Choice" is not in itself a basis for a First

Amendment violation. Once again, the Court stated that plaintiff has been "compelled to decide that in order to avoid any future harm of [discharge] he must refrain from expressing opinions that are contrary to those held by state officials." *Id.* at 40. There is no showing by the instant plaintiff that his dismissal in and of itself will chill his right to express himself or be critical of officials of the State. Therefore, the Magistrate is correct in dismissing plaintiff's failure to state claims.

IV.

The Magistrate's Recommendations regarding dismissal of the conspiracy, pendent state claims and motion for attorney fees are correct and are hereby adopted.

V.

The Magistrate's Report and Recommendation is approved and adopted; Defendant's Motion to Dismiss under Rule 12(b)(6) for failure to state a claim is granted.

IT IS SO ORDERED.

Frank J. Battisti
Chief Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DR. JOHN VODILA, C83-1512A

Plaintiff,

-vs-

RODERICK CLELLAND, et al.,

Defendants. **JUDGMENT ENTRY**

Battisti, C.J.

In accordance with the Order filed on May 17, 1985,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Dismiss under Rule 12(b)(6) for failure to state a claim is granted.

Frank J. Battisti
Chief Judge

Supreme Court, U.S.
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In The Supreme Court of the United States

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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REASON FOR DENYING THE WRIT

No Conflict Exists Between The Decision Of The Sixth Circuit And Those Of The Ninth And Tenth Circuits.

Chastising the Sixth Circuit for failing to explicitly consider the *Chevron Oil Company v. Huson,* 404 U.S. 97 (1971) retroactivity criteria, Petitioner argues that the decision below conflicts with those of *Gibson v. United States,* 781 F. 2d 1334 (9th Cir. 1986) and *Jackson v. City of Bloomfield,* 731 F. 2d 652 (10th Cir. 1984). Although the Sixth Circuit did apply *Wilson v. Garcia,* ____ U.S. ____, 85 L. Ed. 2d 254 (1985) retroactively, while the Ninth and Tenth Circuits did not, the conflict which Petitioner emplores this Court to expend its considerable and valuable time to resolve, and upon which he premises his entire case, is superficial. The reasoning employed by the Ninth and Tenth Circuits, like that employed by the Third and Eighth Circuits, produces the same result reached by the Sixth Circuit—dismissal of Petitioner's liberty interest due process claim.

In *Jackson,* the Tenth Circuit declined to apply Garcia retroactively to defeat the plaintiffs' claims that they were discharged in retaliation for the exercise of their First Amendment rights. Plaintiffs filed suit under §1983 more than three years but less than four years after their dismissals. At that time, there existed two decisions of the Circuit that justified plaintiffs' delay in filing suit. In *Hansbury v. Bd. of Regents of the University of California,* 596 F. 2d 944 (10th Cir. 1979), the court approved the New Mexico four year statute of limitations for claims of unconstitutional employment discrimination under §1983. *Jackson,* 731 F. 2d at 655. Additionally, in *Shah v. Halliburton,* 627 F. 2d 1055 (10th Cir. 1980), the court declared that where the claim could be characterized in more than one fashion, the longer statute of limitations applied. 731 F. 2d at 654. Thus, held the *Jackson* court, it would be unfair to apply the three year personal injury statute, mandated by the *Garcia* decisions, retroactively. *Id.* at 655.

Similarly, in *Gibson v. United States,* the Ninth Circuit declined to apply *Garcia* retroactively because it had, for nearly a quarter of a century prior to *Garcia,* affirmatively declared a longer period of limitations for all §1983 claims. 781 F. 2d at 1338-39.

It was the absence of such clear precedent that caused the Third and the Eighth Circuits to apply *Garcia* retroactively. First, in *Smith v. City of Pittsburgh,* 764 F. 2d 188 (3rd Cir. 1985), *cert. denied,* 106 S. Ct. 1230 (1986), and later, in *Fitzgerald v. Larson,* 769 F. 2d 160 (3rd Cir. 1986), the Third Circuit held that the absence of a decision on the applicable statute of limitations, coupled with the division amongst the district courts in its circuit, precluded the initial *Chevron* factor from being met. *Smith,* 764 F. 2d at 195; *Fitzgerald,* 769 F. 2d at 163. Similarly, in *Wycoff v. Menke,* 773 F. 2d 983 (8th Cir. 1985), the absence of a "definitive standard" adopted by the court led it to reject Wycoff's argument that he could reasonably have delayed filing his procedural due process claim from November 1977, when it fully matured, until December 1981. *Id.* at 986-87.

Thus, while reaching different results, all of the circuits that have expressly applied the *Chevron* criteria have done so in a consistent fashion. Application of that criteria in like fashion to the case at bar would not yield a different outcome.

Petitioner asserts that a six year statute of limitations was the "settled rule of law" at the time he initiated the action at bar. A careful review of Sixth Circuit law reveals the rule to be unsettled, at best.

In *Mason v. Owens-Illinois,* 517 F. 2d 520 (6th Cir. 1975), the Sixth Circuit held that the applicable statute of limitations for a §1981 action in Ohio was Ohio Rev. Code §2305.07, which provides for a six year period. While doing so, the court reaffirmed the then longstanding rule that the statute of limitations is that "which would be applicable in the most closely analogous state action." *Id.* at 521.

Relying upon *Mason,* the Sixth Circuit in 1977 twice rejected the application of Ohio Rev. Code §2305.07's six year period to §1983 actions concerning an improper arrest and perjured testimony. *See Carmicle v. Weddle,* 555 F. 2d 554 (6th Cir. 1977) and *Austin v. Brammer,* 555 F. 2d 142 (6th Cir. 1977).

Similarly, in 1979, the Circuit held that Michigan's shorter three year period for personal injuries, rather than its six year catch-all period applied to actions under §1983. *Geromette v. Gen. Motors Corp.,* 609 F. 2d 1200 (6th Cir. 1979); *An-ti Chai v. Mich. Tech. University,* 493 F. Supp. 1137 (W.D. Mich. 1980).

In addition to *An-ti Chai,* a case which upon Petitioner relied in his brief on the merits in the Sixth Circuit, another district court in the Sixth Circuit adopted a shorter statute for §1983 liberty interest due process claims. In *Hines v. Board of Educ. of Covington, Ky.,* 492 F. Supp. 469 (E.D. Ky. 1980), *aff'd.,* 667 F. 2d 564 (6th Cir. 1982), the District Court held that Kentucky's one year statute for slander applied to the claim that plaintiff's due process rights had been violated when she was fired without a hearing, after being accused of involvement in illicit sex and illegal drugs. The district court, after a review of *Mason, Austin,* and *Weddle,* rejected plaintiff's argument that the provisions of Kentucky Rev. Stat. §413.120(2) setting five years as the limitations period for "an action upon a liability created by a statute" applied.

Despite the absence prior to 1982 of any definitive Sixth Circuit standard for limitations in "name clearing" liberty interest due process claims, Petitioner did not file suit within the one year period for libel and/or slander under Ohio Rev. Code §2305.11. Nor did he file suit within the two year period for personal injury under Ohio Rev. Code §2305.10. Instead, he waited nearly three years to commence this action. Justification, he asserts, for the delay flows from the district court cases of *Campbell v. Sirak,* 476 F. Supp. 21 (S.D. Ohio 1976) and *Schorle v. City of Greenhills,* 524 F. Supp. 821 (S.D. Ohio 1981). Neither of them, however, represents clear precedent for Petitioner's actions.

In *Campbell*, the district court, without discussion and prior to the Sixth Circuit's decisions in *Austin* and *Weddle*, adopted Ohio Rev. Code §2305.07's six year period of limitations in an action involving the discharge of an employee in retaliation for the exercise of her First Amendment rights. Even assuming that the court's adoption of §2305.07 is clearly established precedent, it relates not to a claim where defamatory statements were made about someone who was fired, but rather to the firing of someone who made non-defamatory statements. Thus, Campbell's claim was different in kind from that of Petitioner.

The district court's decision in *Schorle* is likewise of questionable value to Petitioner's argument. *Schorle* was a false arrest action, not a name-clearing, liberty interest action. Furthermore, *Schorle*, itself, represents a break from the Sixth Circuit decisions in *Austin* and *Weddle*.

Thus, had the panel below expressly considered the *Chevron* criteria, it is unlikely that it would have declined to apply *Garcia* retroactively. And, even if the panel might have reached a contrary result, the issue is not unique or of such moment as to warrant review by this Court.

CONCLUSION

WHEREFORE, there being no conflict amongst the circuits or request to alter the longstanding *Chevron* criteria, Respondents urge this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit was mailed via ordinary U.S. Mail to Jay F. McKirahan, Attorney for Petitioner, 3040 Riverside Drive, Suite 103, Columbus, Ohio 43221, on this _____ day of January, 1987.

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